90-64

No.

JUL 9 1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RUBEN L. ALLMAN,

Petitioner,

v.

WESTMORELAND COAL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Was there sufficient evidence before the District Court to create a genuine issue of material fact as to the breach by Allman of the alleged unwritten policies of Westmoreland, for which his employment had purportedly been terminated, so as to preclude the entry of summary judgment?

LIST OF PARTIES

The names of all parties hereto appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Fourth Circuit, to which this petition is addressed, is unpublished, and is reprinted in the Appendix hereto (Pet. App. 1a). The Memorandum Opinion of the Honorable Glen M. Williams, affirmed by the aforesaid opinion, is unpublished, upon information and belief, and is reprinted in the Appendix (Pet. App. 14a).

JURISDICTION

(1) The judgment sought to be reviewed herein was entered by the Fourth Circuit Court of Appeals on February 21, 1990.

(2) On April 9, 1990, an order was granted denying rehearing.

(3) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. Section 1254(1) (1990 Supp.).

(4) The within petition is filed within the time prescribed by 28 U.S.C. Section 2101(c), and Rule 13.1 of the United States Supreme Court Rules.

(5) Jurisdiction was conferred on the Court of Appeals below by filing a timely appeal in accordance with 28 U.S.C. Section 1291.

(6) Jurisdiction was conferred upon the United States District Court for the Western District of Virginia in accordance with 28 U.S.C. Section 1332.

STATUTES AND REGULATIONS INVOLVED

1. United States Constitution, Seventh Amendment: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by the jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. Constitution of Virginia, Article 1, Section 11: ". . . That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five."

3. Rule 56(c), Federal Rules of Civil Procedure: ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

STATEMENT OF THE CASE

1. Prior Proceedings

Ruben L. Allman is a citizen of the Commonwealth of Virginia. His employer, Westmoreland, is a Delaware corporation with its home office in Philadelphia, Pennsylvania. Allman filed suit in the United States District Court for the Western District of Virginia, Big Stone Gap Division, alleging diversity jurisdiction under 28 U.S.C. Section 1332. Allman sought recovery from Westmoreland for wrongful discharge following an accident in Westmoreland's mine, and also for defamation of character, loss of benefits, and intentional infliction of emotional distress.

On January 9, 1989, by interlocutory order, the trial court granted Westmoreland's motion for summary judgment on Allman's claims for wrongful discharge and defamation. The trial court held that Allman had exercised judgment which Westmoreland could have reasonably concluded was a violation of Company Health and Safety Rule No. 69, and a cause for dismissal. The court further held that Allman failed to offer any evidence that the defamatory statements published by Westmoreland explaining the termination of his employment—namely, in general, the violation of state and federal law as well as company policy regulations—were false. On February 24, 1989, the trial court in its final order, granted Westmoreland's motion for summary judgment and dismissed Allman's complaint.

Allman appealed to the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. Section 1291. On February 21, 1990, judgment was entered affirming summary judgment below. Following the grant of an extension of time in which to petition for rehearing, an order was entered without opinion on April 9, 1990, denying rehearing. The within petition seeks relief from those orders.

2. Facts

Your petitioner, Ruben L. Allman, was employed at all times material herein as a section foreman at Westmoreland's Holton Mine, an underground coal mine located near Big Stone Gap, Virginia.

On Saturday, November 29, 1986, Allman reported to work for his regular shift from 4:00 p.m. to 12:00 midnight. His supervisor, John Seabolt, the assistant mine foreman, instructed Allman and two hourly employees, Jack E. Christian and Barry Hill, to build a brattice, which is a partition used to control ventilation, in an area of the coal mine identified as the 3-Right panel, and then to proceed to the area identified as the 2-Right panel to build additional brattices. Longwall mining at the 2-Right panel had been completed; and the longwall shields (which are large devices that support the mine roof as coal is extracted), previously removed for maintenance and repairs, were scheduled to be brought into the mine along the main line, and then up the 3-Right panel to the next operating site. These shields are routinely transported by diesel locomotives coupled to flat-bed supply cars, for the following reason.

Most of the vehicles that travel inside the mine, including the personnel carrier used by Allman on the date in question, are electric-powered track vehicles that receive power from an overhead wire generally referred to as a trolley wire. There are no traffic signals along the track ways. To prevent the possibility of injury if the oversized shields were to come into contact with an energized trolley wire, federal regulations and company procedures required the trolley wire to be de-energized by switching off the electric current from the outside during a longwall move.

Although the longwall move was scheduled for the night in question, experienced operators of the diesel equipment used for hauling failed to report for work;

and accordingly, at the beginning of the shift, John Seabolt told Allman that the move had been cancelled. Later, at about 7:00 p.m., Allman was informed by Carl Sturgill, the longwall maintenance foreman at the working face of the 3-Right panel, that the locomotives hauling the longwall equipment were scheduled to arrive at the 3-Right panel at 8:00 p.m. Allman then returned to his work site, and moved his personnel carrier off the 3-Right track, onto a side track so that the 3-Right track would be available for use by the locomotives without danger to the men or Allman's vehicle.

Allman and his crew completed their work on the 3-Right panel at approximately 8:30 p.m. The locomotives hauling the longwall shields had not yet arrived. Allman had no reason to believe that the locomotives had actually started into the mine. He had not been instructed to wait at his work station until the shields passed. His only instructions involved the next work assignment. Allman and his men were unable to communicate, at their work site, with any other representatives of Westmoreland. There were no radios or telephones at that part of the mine, or affixed to his vehicle; and no portable radios were provided to them by the company. One telephone was located at Sturgill's position, about 2,000 feet further in the 3-Right panel at the working face; and another telephone was located at the entrance of the 3-Right section, approximately 4,500 feet from his work site. Allman knew that the trolley wire would have been de-energized if the diesel locomotives had entered the mine; so upon checking the trolley wire, and discovering that the trolley wire was still energized, he reasonably believed that the longwall move had been cancelled again. Having been previously warned that his job depended upon productivity and safety, he then proceeded with his crew back toward the main track to his next assignment.

In the meantime, after Allman had entered the mine with his crew, Seabolt had contacted four additional em-

ployees to report to work to operate the diesel locomotives, although all of them were unqualified. At about 7:50 p.m., they entered the mine, using the two diesel locomotives to haul the longwall shields. Contrary to Westmoreland procedures and the law, the trolley wire had not been de-energized. As the inexperienced operators approached the entry to the 3-Right panel, the locomotives skidded out of control. Improper operating techniques by one of the operators, named Snodgrass, intensified the slide. Certain track derails in that area of the mine, which, properly maintained, would have provided protection against runaway haulage equipment, had been disabled by the mine superintendent. In addition, sanding devices on the locomotives, used to enhance braking, malfunctioned due to Westmoreland's negligence.

Out of control, the locomotives with the longwall shields skidded down the grade, through the 3-Right switch, derailed, and collided about 50 feet further down track on the 3-Right track with Allman's personnel carrier, which was fully under control. Barry Hill and Ruben Allman were injured, and Jack Christian was killed.

An investigation of the accident was conducted by the Mine Safety and Health Administration which concluded, in the briefest terms, as follows:

> The accident was caused by management's failure to provide experienced, well trained persons to operate the locomotives being used to transport equipment into the mine. Contributing factors to the severity of the accident were:
>
> 1. Management's failure to provide proper communication with persons in the mine to assure that other traffic was not using the same haulage roadway.
>
> 2. Management's failure to de-energize the trolley wire which instilled a false sense of safety to other persons utilizing the same haulage roadway.

3. Management permitting the derails to be spiked closed thereby negating the safety factor they provided against runaway haulage equipment.

4. The personnel carrier not being adequately guarded to prevent persons being thrown from such carrier.

Thereafter, on December 18, 1986, Jerry Light, superintendent of the Holton Mine, discharged Allman for "his actions on November 29, not checking and seeing where the location of the locomotive was before he transported people in the direction of the main line." He claimed that Allman had violated an unwritten company policy which required Allman to communicate with the surface, before moving his personnel carrier. Later, Westmoreland claimed that Allman had violated company Health and Safety Rule No. 69, which provided as follows:

> *FOREMAN*: It should be the first duty of each and every foreman to guard the safety of himself and all employees entrusted to his care. Every foreman shall *ENFORCE COMPLIANCE WITH HIS INSTRUCTIONS, TO THESE RULES, AND THE MINE LAWS.* If a foreman should encounter any dangerous condition which is not governed specifically by these rules or the Mine Laws, he shall take such action as he deems necessary and report the condition to his superior. (Emphasis in original).

About one month after Allman was discharged, articles appeared in local newspapers stating that, according to Westmoreland, Allman had been terminated "for violating company policies and procedures", for the "roles" of Allman and another employee in the accident that killed Jack E. Christian, "for violating company policy", and "for violating company rules and regulations." As a result, Allman's reputation in the community, and his ability to find employment in the mining industry, have been seriously damaged. In so doing, Westmoreland at-

tributed its own failure to provide proper communication with persons in the mine, as concluded in the MSHA report aforesaid, to Allman, who had been exonerated by that report.

ARGUMENT

The Court of Appeals Improperly Affirmed Summary Judgment Below, Which Was Based on Westmoreland's Biased Allegations as to the Existence of Certain "Unwritten Policies" Said to Have Been Violated by Allman, Notwithstanding Clear and Convincing Evidence That the Disputed "Policies" Did Not Exist, and That Allman Was Guilty of No Fault for Which His Employment Could Fairly Be Terminated. As a Result, Allman Has Been Denied a Trial by Jury.

The opinion below has decided a federal question—i.e., the scope of relief available under Federal Rules of Civil Procedure Rule 56—in a way that conflicts with the applicable decisions of this Court and with other precedents in

(a) resolving genuine issues of disputed material facts on summary judgment; and

(b) failing to view all inferences that arise from the materials before the court in a way most favorable to the non-moving party, your petitioner;

(c) thereby depriving your petitioner of his right to trial by jury and necessitating the intervention of this Honorable Court.

First, the majority below has erroneously concluded that all the facts of this case are undisputed. On the contrary, although the foregoing facts are not disputed, nevertheless, there are a number of facts which are hotly disputed, including without limitation the existence vel non of certain unwritten "policies" which Westmoreland now says were in effect at the time of the accident and from which the majority below concluded Allman had deviated. Summary judgment, of course, may not be granted when there is a genuine issue of material fact;

and Allman steadfastly denies that there was any Westmoreland policy requiring *him* to ensure that no one was on the main track during the longwall move, or requiring him to contact someone on the surface before using any track including the main line, or forbidding his use of any section of track which was on the direct route of the locomotives moving the longwall shields.

Those allegations were, to be sure, as noted by the majority below (Pet. App. 3a), made by Light [1] and a judge or jury which chooses to believe that evidence could reach the result announced by the trial court and the majority below. However, this Court has made it abundantly clear that a judge's function on motion for summary judgment is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. If there is any "sufficiently probative" evidence, more than "merely colorable" or "a scintilla", then summary judgment may not be granted. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249-51, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212-13 (1986). The evidence in this case is overwhelming that Allman did not know or even have reason to know that the longwall shields were being transported when he decided to continue with his assignment to the next mine section, and that he was therefore guilty of no fault which would constitute cause for termination. MSHA so concluded, making no reference whatsoever to Allman's involvement. Furthermore, Barry Hill, one of the injured employees under Allman's supervision, served as Chairman of the United Mine Workers Union Safety Committee at the mine. He stated that he was present with Allman at all times during the shift in question; and Allman vio-

---

[1] Light, it should be noted, made the decision to spike the track derails closed, thereby disabling those safety devices in violation of Westmoreland's written safety rule requiring derails to be kept open. Although MSHA reported that this violation played "a significant role" in the accident, Light was neither reprimanded nor fired.

lated no company policy or procedures, and did not perform or cause to be performed any unsafe act during that shift. Finally, Hershel H. Hayden, Vice President for Westmoreland's Virginia Operations, testified that, to the best of his knowledge, Allman had not violated any federal or state law, nor any company rule or regulation. The inference thus arises, clearly and unmistakably, that no such policies existed, and that Allman was a scapegoat in this tragic accident. Your petitioner contends that the trial court and appellate majority below were plainly wrong in reaching the contrary result.

The majority below erroneously relies on four district court opinions, all construing contracts, in support of their conclusion that summary judgment is warranted herein. *Von Komen* v. *Montgomery Ward & Co.*, 638 F. Supp. 739, 741 (C.D. Cal. 1986); *Lee* v. *Albemarle County School Board*, 648 F. Supp. 744, 749 (W.D. Va. 1986), *aff'd*, without pub. op., 829 F.2d 1120 (4th Cir. 1987), *cert. denied*, 487 U.S. ——, 108 S. Ct. 2905, 101 L.Ed.2d 937 (1988); *McKnight* v. *North Charles General Hospital*, 652 F. Supp. 880, 881 (D. Md. 1986); *Thompson* v. *American Motor Inns, Inc.*, 623 F. Supp. 409, 417 (W.D. Va. 1985) (decided after full trial without a jury, on the merits). The crucially important factor, however, which distinguishes the case at bar from the aforesaid decisions, is that Allman's contract imposed upon him a duty "to guard against the safety of himself and all employees entrusted to his care". As the dissent below aptly found (Pet. App. 11a), without rebuttal by the majority, ordinary due care is the standard by which the case must be judged[2]; and as a general proposition,

[2] Light was asked on depositions whether Allman's alleged failure to determine the location of the locomotives, which was the genesis of his discharge, was a violation of company policy or state law or federal law. His answer was, "That's just not acting responsible." When asked, "Okay, it's just a general thing, then?" He replied again: "It's just not acting responsible. In his job, he's supposed to be a responsible person."

> ". . . issues of negligence are not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner." 6 Moore's Federal Practice, Paragraph 56.17[42] at 56-946 (1985).

See also *Cook* v. *Baker Equipment Engineering Co., Inc.*, 582 F.2d 862, 865 (4th Cir. 1978), noting that:

> "Summary judgment is particularly inappropriate in negligence actions. . . . It is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper."

The majority opinion also departed from this Court's holding in *United States* v. *Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176, 177 (1962), requiring not only that there be no genuine issue of material fact, but further requiring that all inferences to be drawn from the subsidiary facts contained in the papers before the trial court be viewed in a light most favorable to the party opposing the motion. The majority recognized that rule, citing *Helm* v. *Western Maryland Railway Co.*, 838 F.2d 729, 734 (4th Cir. 1988). However, the dissenting opinion below makes palpably clear the inference that Allman was free from any fault. In disregarding that evidence, which was nowhere mentioned by the majority, they clearly departed from the *Diebold* holding. As a result, your petitioner has been improperly denied his constitutionally protected right to have the evidence, and the favorable inferences flowing therefrom, heard by a jury of his peers. U. S. Const. amend. VII; Va. Const., Art. I, section 11.

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit Court of Appeals, insofar as it holds that there is no genuine issue of material fact and no ground upon which reasonable men could find that your petitioner was wrongfully terminated, should be reversed; and Allman's

claims, including the pendent claim for defamation, should be remanded for consideration in keeping with this Court's opinion.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2348

RUBEN L. ALLMAN,
Plaintiff-Appellant,

v.

WESTMORELAND COAL COMPANY,
Defendant-Appellee.

No. 89-2395

RUBEN L. ALLMAN,
Plaintiff-Appellant,

v.

WESTMORELAND COAL COMPANY, INC.,
Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Virginia, at Big Stone Gap
Glen M. Williams, Senior District Judge—
(C/A No. 87-0115-B)

Argued: November 2, 1989 Decided: February 21, 1990

Before HALL and MURNAGHAN, Circuit Judges, and HARGROVE, United States District Judge for the District of Maryland, sitting by designation.

Charlie R. Jessee (CHARLIE R. JESSEE & ASSOCIATES, on brief) for Appellant. Thomas P. Gies (CROWELL & MORING, on brief); F. Thomas Rubenstein (WESTMORELAND COAL COMPANY, on brief) for Respondent.

PER CURIAM:

This case is on appeal from the United States District Court for the Western District of Virginia, Big Stone Gap Division. The trial court (The Honorable Glen M. Williams, U.S.D.J.) granted Westmoreland Coal Company's ("Westmoreland") motion for summary judgment on claims of wrongful discharge and defamation brought by Ruben L. Allman ("Allman"). Judge Williams found that Westmoreland had the requisite cause necessary to discharge Allman and that, because the discharge was proper, Allman could not meet his burden required by the defamation claim of showing falsity in any material respect in the statements issued by Westmoreland. For the reasons that follow, this Court affirms.

FACTS

The facts of this case are not in dispute. Allman was employed as a section foreman at Westmoreland's Holton Mine, an underground coal mine located near Big Stone Gap, Virginia. On Saturday, November 29, 1986, Allman reported to work for his regular shift from 4:00 p.m. to 12:00 midnight at the Holton Mine. His supervisor, John Seabolt, an assistant mine foreman, instructed Allman and two hourly employees, Jack E. Christian ("Christian") and Barry Hill ("Hill"), to build a brattice, a par-

tition used to control ventilation, in an area of the coal mine identified as the 3-Right panel and then to proceed to the area identified as the 2-Right panel to build additional brattices.

While Allman's crew was building brattices in the 3-Right panel, a piece of coal mining equipment called a longwall shield was scheduled to be transported along the main line to the 3-Right panel. Longwall shields are large machines that support the mine roof as coal is extracted. At the Holton Mine, these shields are transported by diesel locomotives coupled to flat-bed supply cars.

Most of the vehicles that travel inside the mine, including the personnel carrier used by Allman on the date in question, are electric-powered track vehicles that receive power from an overhead wire generally referred to as a trolley wire. There are no traffic signals along the trackways. To prevent the possibility of injury if equipment or people were to come into contact with an energized trolley wire, federal regulations and company procedure require the trolley wire to be "de-energized" by switching off the electric current from the outside when longwall equipment is being moved into the mine. *See* 30 C.F.R. § 75.1003-2 (1987); Deposition of Ruben L. Allman at 119. Additionally, it is Westmoreland's policy that, during a longwall move, foremen are required to ensure that no one is on the main line track and that, before the main line track is used, someone on the surface is contacted. Affidavit of Jerry Light, Superintendent of Holton Mine ("Light Affidavit") at 1. Defendant's policy also forbids the foremen's use of any section of track which is on the direct route of the locomotives moving the longwall shield. *Id.*

At 7:20 p.m., Allman was informed by Carl Sturgill ("Sturgill"), the longwall maintenance foreman, that the locomotives hauling the longwall equipment would arrive inside the 3-Right panel at 8:00 p.m. After speak-

ing with Sturgill, Allman moved his personnel carrier off the main track and onto a switchout, or side track, installed off the 3-Right track so that the 3-Right track would be available for use by the locomotives.

Allman and his crew completed their work on the 3-Right panel at approximately 8:30 p.m. The locomotives hauling the longwall shield had not yet arrived in the 3-Right panel, so Allman checked the trolley wire and discovered that the trolley wire was still energized. Since the trolley wire should have been de-energized for the longwall move, plaintiff wrongly assumed that the longwall move had been canceled. Allman then decided to move the personnel carrier and his crew back onto the 3-Right track to proceed along the main line to their next assignment in the 2-Right panel. Contrary to company policy, Allman did not attempt to verify the status of the movement of the longwall shield even though there was a telephone connected with the surface approximately two thousand feet away from where Allman was working in the 3-Right panel.

While the personnel carrier being used by Allman and his crew was on the 3-Right track en route to the 2-Right panel, the carrier collided head-on with the locomotives that were bringing the longwall shield into the mine.[1] As a result of the accident, Christian was killed and Hill and Allman were injured. Following several investigations of the accident, Allman, as well as the driver of the locomotives, was discharged for violating company policies and safety rules.

After Allman was discharged, Westmoreland was contacted by several newspaper reporters regarding the accident on November 29, 1986, and the subsequent discharge of Allman and others. At least three newspapers

[1] At the time of the accident, the locomotives that were transporting the longwall shield into the mine were out of control. The driver of the locomotives was also fired by Westmoreland.

printed stories based on statements made by Westmoreland representatives. Allman claims that the statements released by Westmoreland personnel defamed him.

Allman filed suit in the United States District Court for the Western District of Virginia on July 9, 1987, claiming wrongful discharge, defamation, emotional distress and loss of benefits. Defendant filed a motion for summary judgment after extensive discovery was taken by both parties. A response and a reply were subsequently filed. Judge Williams issued a memorandum opinion and order on the motion for summary judgment on January 9, 1989, without oral argument. The district court granted, *inter alia*, defendant's motion for summary judgment against Allman on both the wrongful discharge and defamation claims.[2] Judge Williams dismissed the remainder of the complaint with prejudice on February 24, 1989. Allman filed a timely appeal on March 13, 1989.

LAW

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must show that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party can rebut the moving party's showing "by any of the kinds of evidence listed in Rule 56(c), except the mere pleadings themselves . . . ." *Celotex*, 477 U.S. at 324.

Summary judgment will be denied when "the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for

[2] Westmoreland did not move for summary judgment on the emotional distress count.

the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). An appellate court reviewing the grant or denial of a summary judgment motion applies the same standard as the trial court. *Helm v. Western Maryland Railway Co.*, 838 F.2d 729, 734 (4th Cir. 1988); *Ballinger v. North Carolina Agricultural Extension Service*, 815 F.2d 1001, 1004 (4th Cir.), *cert. denied*, 484 U.S. 897 (1987). The appellate court must reverse a grant of summary judgment if it appears from the record that there is an unresolved issue of material fact. *Helm*, 838 F.2d at 734. All inferences to be drawn from the underlying facts are to be viewed in the light most favorable to the party opposing the motion. *Id.* Allman argues that the trial court should have denied the motion for summary judgment because there was a genuine issue of material fact, *i.e.*, whether Allman's dismissal was permissible under his employment contract with Westmoreland.

1. *Wrongful Discharge Claim*

Virginia is an employment-at-will state. *Miller v. SEVAMP, Inc.*, 234 Va. 462, 362 S.E.2d 915 (1987). Thus, unless there is a contract to the contrary, an employer or employee can terminate the employment relationship at any time, for any reason. *Thompson v. American Motor Inns, Inc.*, 623 F. Supp. 409, 416 (W.D. Va. 1985). For purposes of this appeal, defendant concedes that Westmoreland's Employee Relation Manual ("Manual") constituted a contract between the parties.

The Manual contains the following "Policy Statement":

> Except in situations where the seriousness of the offense warrants immediate discharge, employees will, through counseling and disciplinary warnings, be made aware of problems and be given ample opportunity to correct such problems.[3]

---

[3] Prior to the incident at issue in this case, Holton Mine's section foremen, including Allman, had been warned that their employment

> When discharge becomes necessary, it is further our philosophy that discharge will be only for cause. Discharge for cause includes but is not limited to violations of Company policies, procedures or rules, violations of State or Federal laws or regulations. . . .

Manual at 1.

The Manual specifies that: "It should be clearly understood . . . that certain serious offenses may be cause for immediate discharge . . . ." Manual at ——, Joint Appendix at 69. Westmoreland provides an illustrative list of offenses that the company considers "serious"; the list includes theft, unprovoked assault, dishonesty, distributing illegal drugs, and purposely damaging or destroying company property.

Westmoreland maintains that Allman violated company policy and was therefore permissibly dismissed. Defendant cites one example of a company policy violated by plaintiff as Westmoreland Virginia Operations, Health & Safety Rules ("Rules"), Rule Number Sixty-Nine ("Rule 69"), August 1983. That rule states:

> *FOREMAN*: It should be the first duty of each and every foreman [to guard the safety of himself and all employees entrusted to his care.] Every foreman shall *ENFORCE COMPLIANCE WITH HIS INSTRUCTIONS, TO THESE RULES, AND THE MINE LAWS.* If a foreman should encounter any dangerous condition which is not governed specifically by these rules or the Mine laws, he shall take such action as he deems necessary and report the condition to his superior.

Rules at 15 (emphasis in original).

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was in jeopardy because of poor mine productivity and safety records. The section foremen were warned that improvement was required.

When a plaintiff presents no genuine issue of material fact, but merely a question of interpretation, summary judgment is warranted. *See Von Komen v. Montgomery Ward & Co.*, 638 F. Supp. 739, 741 (C.D. Cal. 1986); *Lee v. Albemarle County School Board*, 648 F. Supp. 744, 749 (W.D. Va. 1986), *aff'd*, 829 F.2d 1120 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 2905 (1988); *McKnight v. North Charles General Hospital*, 652 F. Supp. 880, 881 (D. Md. 1986); *Thompson*, 623 F. Supp. at 417. On appeal, Allman does not contest the district court's finding of fact, only the application of company policy to those facts.

Plaintiff argues, *inter alia*, that the trial judge failed to consider the "subjective standard" of Rule 69. Allman argues that the last sentence of Rule 69 gave him the discretion to "take such action as he deem[ed] necessary." Allman claims that it was reasonable for him to proceed with his crew to the next assignment in the 2-Right panel because he had concluded that the longwall shield move had been canceled. Juxtaposing the facts of this case with company policy, it is apparent that Allman cannot rely on the last sentence of Rule 69 to contest his discharge.

Rule 69 gives a foreman discretion to do what he deems necessary if and when the foreman encounters a dangerous condition not specifically governed by Westmoreland's rules or the Mine Laws. Initially, it must be noted that Allman did not encounter a dangerous condition: he created one. If Allman had followed company policy, he would not have been traveling along the main line at the same time that a locomotive was moving a longwall shield into the mine. This error is especially grievous considering the proximity of Allman to a telephone line that would have connected him to the surface; if Allman had called the surface he would have been informed that the longwall move was indeed in progress and that it was dangerous to be on the main line.

Pursuant to Rule 69, Allman, as foreman, was charged with the safety of himself and the employees entrusted to his care, Christian and Hill. On November 29, 1986, Christian was killed and Hill and Allman were hurt as a direct result of Allman's decision to proceed to the assignment in the 2-Right panel via the main line when he had been told that a longwall shield move was scheduled. As stated in the Manual, employees may be immediately dismissed for violating Westmoreland's policies, procedures or rules. Thus, Allman was permissibly fired by Westmoreland for violating company policy pursuant to the policy statement contained in the Manual and Rule 69. The district court's grant of Westmoreland's motion for summary judgment on the wrongful discharge is affirmed.

2. *Defamation Claim*

Allman also argues that he was defamed by Westmoreland's statements that he was fired for violating company policy. Truth is a defense to a charge of defamation where the protected interest is personal reputation. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489 (1975). *See also Pilkenton v. Kingsport Publishing Corp.*, 395 F.2d 989, 990 (4th Cir. 1968); *Brown v. Shupe*, 629 F. Supp. 760, 760-61 (E.D. Va. 1985). Allman conceded at oral argument that if this court affirmed the granting of summary judgment for Westmoreland, Allman could not prove falsity in Westmoreland's statement. Thus, the district court's grant of Westmoreland's motion for summary judgment on the defamation claim must also be affirmed because Allman cannot meet his burden of showing falsity in Westmoreland's statement.

AFFIRMED

MURNAGHAN, Circuit Judge, dissenting:

The panel holds that, as a matter of law, no reasonable jury could find that Ruben Allman was not careless in the performance of his mine duties. The panel therefore affirms the district court's summary judgment ruling claims. Because I consider the record to contain sufficient evidence to put the issue of Allman's carelessness in dispute, I would reverse the district court's judgment. I respectfully dissent.

I.

On November 29, 1986, an accident occurred in Westmoreland Coal Company's Holton Mine. On one side of the unfortunate collision was a runaway train—two connected diesel locomotives carrying heavy longwall equipment into the mine and skidding out of control. On the other side was an electric personnel trolley, carrying three miners who were traveling to their next assignment. One of the three miners, Jack Christian, was killed when the impact of the collision hurled him out of the carrier and underneath the lead locomotive. The other two, Ruben Allman and Barry Hill, were injured.

Allman, the supervisor of the three-man crew, was fired, along with the train operator, for his role in the fatal accident. When he commenced his ill-fated shift, at 4:00 p.m. on November 29, 1986, he was assigned a crew of two men and was instructed to build two brattices, each in a different section of the mine. At 7:20 p.m. he was informed that, at 8:00 p.m., diesel locomotives would be transporting longwall equipment along the track system where his crew was at work. But by 8:30 p.m., when Allman's crew completed the first brattice, the locomotives had not arrived. Allman checked to see if the electric trolley wire, built over the track, was energized. Company procedure and federal regulations required that the electric trolley wire be de-energized during longwall moves for safety reasons. Because, on checking, Allman found that the trolley wire was still

energized, he assumed that the longwall move had been canceled and took his crew to their next assignment. The personnel carrier, in which the trip to the next assignment was made, collided head-on with the runaway train. The runaway train had been allowed to enter the mine, contravening company procedure. Westmoreland terminated Allman's employment with the company.

Allman filed suit, claiming that Westmoreland did not have the cause to discharge him that was required under his employment contract. The district court rejected his contentions, holding that, even if he had a contract with Westmoreland, Allman's actions were "clearly a serious error in judgment and a violation of Health and Safety Rule No. 69," and thus constituted the requisite cause for discharge. The panel has affirmed the district court's judgment, reasoning that Allman was permissibly fired for violating Rule 69, as incorporated by the employment contract.

II.

Rule 69 essentially provides that mine foremen are not to be negligent: "It shall be the first duty of each and every foreman to guard against the safety of himself and all employees entrusted to his care." The rule is incorporated into the alleged employment contract: "Discharge for cause includes but is not limited to, violations of Company policies, procedures or rules . . . ."

I cannot agree that the only possible conclusion that a fact-finder could reasonably draw from the evidence is that Allman was negligent. Consider the following:

1. The Mine Health & Safety Administration conducted a comprehensive investigation into the accident. On November 29, 1986, it issued a report, which concluded as follows (emphasis added):

> The accident was caused by management's failure to provide experienced, well-trained persons to oper-

ate the locomotives being used to transport equipment into the mine. Contributing factors to the severity of the accident were:

> 1. Management's failure to provide proper communication with persons in the mine to assure that other traffic was not using the same haulage roadway.
>
> 2. Management's failure to de-energize the trolley wire which instilled a *false sense of security* to other persons utilizing the same haulage roadway.
>
> 3. Management permitting the derails to be spiked closed thereby negating the safety factor they provided against runaway haulage equipment.
>
> 4. The personnel carrier not being adequately guarded to prevent persons from being thrown from the carrier.

MHSA, after a full investigation, did not even mention Allman's actions as a partial cause of the mishap. Indeed, the report emphasized that it was management's malfeasance that instilled a false sense of security in Allman.

2. Barry Hill, chairman of the safety committee at the Holton Mine, was a passenger in the personnel trolley at the time of the fatal accident. He swore, in an affidavit, that: "Mr. Allman violated no company policy or procedures and did not perform or cause to be performed any unsafe act . . . ."

3. Hershiel Hayden, the vice-president of Westmoreland who gave the final approval to fire Allman, stated at his deposition that, to the best of his knowledge, Allman had not violated any company rule or regulation.

To my mind, the evidence puts the question of Allman's negligence at issue, and thus the question is one appro-

priate for the trier of fact, not for us. Rule 69 provides that Allman may be discharged only if he failed to guard the safety of his men.* I cannot accept the conclusion of my brothers that the question of whether Rule 69 was violated is not at issue.

I would therefore reverse the district court's grant of summary judgment on Allman's wrongful discharge claim. Because Allman's defamation claim is parasitic to the wrongful discharge claim, I would reverse the district court's judgment as to that claim as well.

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* The panel also briefly refers to an unwritten company policy that was allegedly violated by Allman. Jerry Light, the mine superintendent, swore in an affidavit that the company had an unwritten policy "that foremen are to ensure that no one is on the main line track during a longwall move and that they are required to contact someone on the surface before using the main line."

The unwritten policy, however, cannot here be used to support summary judgment. The existence of the unwritten policy is in dispute, as recognized by the district court. The following evidence, already outlined previously, supports Allman's position that there was no such unwritten policy: (1) Hill, chairman of the mine's safety committee, was with Allman when the accident occurred and swore that Allman violated no company policy; (2) Hayden, who gave the approval for Allman's discharge, stated that no policy had been violated by Allman; (3) MHSA made no reference to any unwritten policy in its comprehensive report; and (4) Light, during his deposition, did not refer to the allegedly unwritten policy, or any policy, when asked if Allman had violated any company policy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON AND BIG STONE GAP DIVISIONS

Civil Action Number 87-0342-A

JOHN R. SEABOLT,
Plaintiff

v.

WESTMORELAND COAL COMPANY,
Defendant

Civil Action Number 87-0115-B

RUBEN L. ALLMAN,
Plaintiff

v.

WESTMORELAND COAL COMPANY,
Defendant

Civil Action Number 87-0144-A

ALLEN-RAY MORRIS,
HURSHELL LEE JOHNSON,
HAROLD SARGENT,
JOHN BALLARD NAPIER,
Plaintiffs

v.

WESTMORELAND COAL COMPANY,
Defendant

MEMORANDUM OPINION

[Filed January 9, 1989]

The plaintiffs are all former employees of Westmoreland Coal Company, the defendant. They were employed at Westmoreland's Holton mine near Big Stone Gap, Virginia, until December of 1986, when they were discharged. They now bring suit for wrongful discharge and defamation of character; in addition, plaintiff Ruben Allman alleges intentional infliction of emotional distress.[1] Westmoreland has moved for summary judgment on all claims. All the plaintiffs are citizens of Virginia. Westmoreland is a Delaware corporation with its home office in Philadelphia, Pennsylvania. This court's jurisdiction is obtained under 28 U.S.C. § 1332.

I.

Plaintiffs Morris, Johnson, Sargent, and Napier were all section foremen at the Holton mine; Seabolt was assistant general mine foreman in charge of second shift operations. At the time they were hired, they state that they each were given a copy of Westmoreland's Employee Relations Manual, which provides for discharge only for "cause." They contend that this manual constituted a contract between Westmoreland and themselves, and that their discharges were without good cause and therefore a breach of their employment contract. In addition, plaintiffs maintain that statements made to the press by Westmoreland about their firings were defamatory. For its part, Westmoreland denies that the Employee Relations Manual created an employment contract; states that the company had good cause to fire plaintiffs; and avers that the statements to the press were privileged communications under Virginia law.

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[1] Westmoreland has not moved for summary judgment on the intentional infliction of emotional distress claim.

In support of the motion for summary judgment, Westmoreland has introduced affidavits and depositions which show that in 1985, the productivity and safety records of the Holton Colliery were both substantially below the industry norms and below the level necessary to succeed in the marketplace. Mine management was replaced in February 1986. The company's vice-president in charge of Virginia operations, Hershiel Hayden, gave the new mine superintendent, Jerry Light (who, along with the new General Mine Foreman, Steve Potter, had previously been successful in turning around another Westmoreland mine), the option of replacing any section foremen who were not up to scratch, since Mr. Hayden believed that poor management of the work force was at the root of the difficulties. Section foremen are the lowest level of supervisory employee. Instead of firing section foremen immediately, Mr. Light, in his affidavit, states that he warned the existing foremen that improvement was required and their jobs were on the line unless the situation was turned around.

Mr. Hayden's affidavit states that despite the company's best efforts to work with the existing section foremen, production continued to be poor, and, in an attempt to pinpoint subpar managers, he and Jerry Light decided to give all the section foreman at Holton performance evaluations. Those who did not receive a score of at least "adequate" would be discharged.

The actual evaluations were conducted by Jerry Light and Steve Potter. The evaluations, according to Michael Cassity, Westmoreland's Personnel Manager, were part of Westmoreland's standard performance appraisal system, which involved arriving at annual "performance plans," then evaluating the employee's actual performance against the plan. Seventy-five (75) percent of the final score is determined by objective factors, viz., "production," (25% of the score) is based on shift-wide

production figures, "cost control (25%) comes from mine-wide cost figures, and safety (25%) from the number of violations reportable to the mine Safety and Health Administration. The remaining 25% is at the discretion of the supervisor, from his opinion of the foreman's mining practices, labor relations, communication abilities, and "completion of section success card goals." Each employee is rated on a scale of 1 to 5, with "1" being "unsatisfactory" and "5" outstanding." A rating of 2 was considered acceptable for foremen working in continuous miner units, but a 3 was required of those working in the more efficient longwall sections.

The plaintiffs Morris, Sargent, Napier and Johnson were given scores of 2.25, 1.7, 1.875 and 1.98, respectively.[2] As a result, Messrs. Light and Potter discharged them for "poor performance."

The firing of plaintiffs Seabolt and Allman came about in an entirely different manner, namely, the head-on collision of two mine transports under their control. Seabolt, the assistant general mine foreman, had the responsibility of moving the longwall shields (which support the ceiling of the mine during longwall operations) to the face of the seam then being mined. The shields are transported on cars put between two diesel locomotives. Most of the transports which travel inside the mine are electric, and receive power from an overhead wire (catenary) generally referred to as a "trolley wire." Because there are no signals on the line, and to prevent injury if equipment comes into contact with the trolley wire, Federal regulations require that the electric current be switched off when equipment is being moved into the mine. Mr. Seabolt admits in his deposition that this was his responsibility and he simply forgot to

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[2] Sargent's evaluation score of 2 was below company requirements as he worked in a longwall section.

do it. In addition, when the motormen who normally operated the diesel locomotives did not show up for work, he assumed the responsibility for operating the locomotives himself, although he had had only "10 to 15 minutes" training in operating diesel locomotives. Since four men altogether were needed to run the two locomotives, Mr. Seabolt got three miners (who had no experience whatever with diesel locomotives, although they were experienced electric transport motormen) to help him, telling them that he would train them as they went along.

Meanwhile, plaintiff Allman, a section foreman working with a crew inside the mine, had been informed that a longwall move was about to take place. Westmoreland states that its policy requires foremen to keep off the main line during a longwall move, and to communicate with the surface before using the main line if a move is necessary. When the crew Allman was supervising finished its work, Allman decided to move on to his next assignment using the main line, because current was still flowing through the trolley wire and he assumed that if a longwall move was taking place that power would have been cut off. He did not check with anyone on the surface because no phone was convenient.

At the precise moment Allman and his crew were moving to the surface in their electric trolley, Seabolt and his crew, having stalled and restarted several times, were losing control of the diesel locomotives moving the longwall shields into the mine. They jumped off just as the locomotives collided head-on with Allman's trolley. One of the miners on the trolley was killed and others were injured.

Westmoreland thereupon discharged Seabolt and Allman. Since the applicable law is similar, the various plaintiffs' wrongful discharge and defamation claims will be considered together.

II.

On a motion for summary judgment, the moving party is entitled to a judgment as a matter of law where the non-moving party has failed to make a sufficient showing of an essential element of his case on which he has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The standard for granting summary judgment mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); see also *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624 (1944). Rule 50(a) requires the trial judge to direct a verdict if, under controlling law, there can be only one reasonable conclusion as to the verdict. *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80 (1943). *Cf. Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949) (where reasonable minds could differ as to the interpretation of evidence, verdict should not be directed). Of course, the standard under Rule 56 requires more than "the mere existence of *some* alleged factual dispute between the parties;" there must be "no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-8 (emphasis in original).

III.

Although, as the defendant points out, the employment-at-will doctrine is "alive and well in Virginia," *Miller v. SEVAMP, Inc.*, 234 Va. 462, 362 S.E.2d 915 (1987), the doctrine is not absolute. *Id.* at 466, 362 S.E.2d at 917. *See also Bowman v. State Bank of Keysville*, 229 Va. 534, 539, 331 S.E.2d 797, 801 (1985). The origin of employment-at-will was the assumption of the common-law judges that if the intended duration of a contract for the rendition of services could not be determined from the terms of the contract, then either party could terminate the contract at any time. *Stonega Coal and Coke Co. v. Louisville & N.R. Co.*, 106 Va. 223, 226, 55 S.E. 551, 552 (1906). If an employee is free to quit his

employment at any time, "notions of fundamental fairness" require that the employer be free to discharge him at any time. *Town of Vinton v. City of Roanoke*, 195 Va. 881, 896, 80 S.E.2d 608, 617 (1954).

As this court noted in *Thompson v. American Motor Inns, Inc.*, 623 F.Supp. 409, 416 (W.D.Va. 1985), employment-at-will is a rebuttable presumption rather than a substantive rule of law. *Cf. Miller v. SEVAMP, Inc.*, 234 Va. at 466, 362 S.E.2d at 917 ("a pleading seeking to recover damages for the termination of a contract of employment, the terms of which give rise to no fair inference of a specific period for its intended duration, and which is not supported by any substantial additional consideration taking it out of the category of an employment-at-will, is demurrable."). Evidence sufficient to establish an implied contract concerning duration of employment effectively rebuts the presumption of at-will status and binds the employer to the terms of such a contract. *Thompson* at 416. Provisions in an employee handbook providing discharge only for "just cause" or other enumerated reasons are such evidence. *Id.* at 417.

The Westmoreland handbook, called the Employee Relations Manual, under the heading "Discharge" contains the following "Policy Statement:"

> It is the philosophy of Westmoreland Coal Company to promote a work environment that fosters a sense of fairness and job security. Westmoreland believes in a practice of progressive discipline. Except in situations where the seriousness of the offense warrants immediate discharge, employees will, through counseling and disciplinary warnings, be made aware of problems and be given ample opportunity to correct such problems.
>
> When discharge becomes necessary, it is further our philosophy that discharge will be only for cause. Discharge for cause includes but is not limited to

> violations of Company policies, procedures or rules, violations of State or Federal laws or regulations, unsatisfactory job performance, excessive absenteeism, theft of Company property, and the use of alcohol and/or controlled substances on Company property.
>
> Notwithstanding anything stated herein, management reserves the right to reduce the workforce due to economic necessity.

The Manual continues:

> Westmoreland has developed a discipline philosophy effectively taking into account all the factors contributing to behavior or performance which is [sic] clearly not in the best interest of the employee or the organization.
>
> Westmoreland believes that discipline is a positive tool to correct undesired conduct or performance and is applied in a fair and consistent manner on a nondiscriminatory basis. Westmoreland further believes that discipline, depending upon the severity of the offense, should be both corrective and progressive in nature. The progressive approach is consistently applied in cases where the offense is not serious enough to warrant immediate discharge (for example, absenteeism, tardiness). It should be clearly understood, however, that certain serious offenses may be cause for immediate discharge (for example, theft, unprovoked assault, dishonesty, falsification of records, using or distributing illegal drugs, purposely damaging or destroying company property). These cited examples are illustrative and not exhaustive.

The first step in the manual calls for a counseling session with at least one private discussion between the employee and "his/her" immediate supervisor in which the company's view of the employee's inedaquate per-

formance is to be set forth. "The employee and his/her immediate supervisor identifies [sic] in writing corrective action that [sic] can be taken to abate the problem area(s)," and "agree in writing to meet again in a reasonable amount of time to determine whether such efforts have been successful . . . . A Performance Improvement Plan may be developed to help employees attain the performance levels identified by the supervisor."

Step Two is a written reprimand which "identifies the offense, corrective action [sic] and establishes a prescribed time limit for follow-up," and warns the employee that he may be suspended if there is no improvement.

In Step Three, the employee is placed on disciplinary suspension, with the employee on notice that this time he may be discharged if there is no improvement.

Finally, Step Four requires that before an employee is discharged his "immediate supervisor must discuss the case with the appropriate Operations Level Manager . . . . All decisions to discharge an employee must be reviewed by the Personnel Manager and Vice-President, Virginia Operations before taking final action. Discharge may be effected immediately if the severity of the offense warrants such action."

Clearly emerging from this fog of verbiage is Westmoreland's undertaking to discharge employees only for cause, and then only after taking steps to insure that the employee is well aware of the company's dissatisfaction with his performance, exceptions being made where the employee's infraction was severe, or when the company has to lay people off for economic reasons.

Westmoreland advances two arguments to defeat the application to the Employee Relations Manual's standards to the facts in this case. It says first that the Manual was provided to supervisors as a guide to help them deal with their subordinates, and was not intended to be viewed by employees. Second, it says that even assuming

the Manual created an implied in fact contract with the plaintiffs, they were all discharged for just cause in accordance with the provisions in the Manual.

The court finds itself in agreement with Westmoreland on the second point as to plaintiffs Seabolt and Allman. The Manual specifically allows immediate discharge for serious offenses, and "violations of State or Federal laws or regulations [or] violations of Company policies, procedures, or rules" are specifically listed as grounds for discharge. In failing to disconnect the trolley power before moving the longwall shields into the mine, Mr. Seabolt, who, it will be remembered, was the assistant general mine foreman in charge of second shift operations, violated 30 C.F.R. § 75.1003-2(f) (1987); Mr. Seabolt admitted that he knew about the regulation and simply forgot to "kick" the power. This lapse of memory helped to set in motion the sequence of events which led to the collision with the car carrying Mr. Allman's crew, and the resultant death of a miner. The court agrees that this violation of federal law was serious enough to warrant immediate discharge. Although Mr. Seabolt has claimed, in mitigation of his actions, that the trolley power was "jumped" at the circuit breakers and that therefore even if he had remembered to go through the motions of "kicking" the power the trolley wire would have remained energized, the point is that he is seeking damages because of the company's violation of the Employee Relations Manual, and if that Manual provides specific justification for discharge, as it does here, the court, although sympathetic to Mr. Seabolt's unwillingness to be a scapegoat, has no authority to referee a dispute over the ultimate fairness or unfairness of the company's action. Even assuming that Westmoreland was fastening the blame on the wrong person in firing Mr. Seabolt, his violation of federal regulations means that they did not violate any provisions in the Employee Relations Manual. The courts cannot allow themselves

to be used as a forum for second-guessing company personnel decisions.

Mr. Allman likewise lays great stress on the failure of others to follow safety rules as being the cause of the accident, but this does not exonerate him from all responsibility.

His failure to check with anyone about the status of the longwall move, after being informed that it was about to take place, was clearly a serious error of judgment, and a violation of company Health and Safety Rule No. 69 which states in part:

> It shall be the first duty of each and every foreman to guard the safety of himself and all employees entrusted to his care. Every foreman shall ENFORCE COMPLIANCE WITH HIS INSTRUCTIONS, TO THESE RULES, AND THE MINE LAWS. (Emphasis in original).

Although the parties dispute whether or not there was a mine rule that no trolleys should operate during a longwall move without first checking with the surface, the court does not believe that it really matters for purposes of the wrongful death charge count: although the Employee Relations Manual lists violation of state and federal laws as a "cause" for discharge, it also states that the list is "illustrative and not exhaustive." Westmoreland could reasonably have concluded that the poor judgment shown by Mr. Allman was a violation of Rule 69 and a cause for dismissal.

The court therefore concludes that it is appropriate to grant summary judgment to Westmoreland on the wrongful discharge counts brought by Messrs, Seabolt and Allman.

However, the situation of the other plaintiffs is different. They were all discharged for poor performance of their duties as section foremen. The Employee Rela-

tions Manual contemplates giving employees "ample opportunity to correct such problems," and by its terms sets out a three-step procedure for counseling and discipline before an employee is discharged. In *Thompson v. American Motor Inns*, this court held that where the employer, in its own employee handbook, had made "specific promises to its employees not to dismiss [them] without three warnings or just cause," it had fixed the duration of employment" according to the procedures set out in the handbook. 623 F.Supp. at 416. The promises enumerated in Westmoreland's Employee Relations Manual are very similar.

Westmoreland, as noted above, attacks the applicability of the *Thompson* holding to the facts in this case because, they insist, the "Employee Relations Manual" in this case is really a "supervisor's manual," intended solely to guide company officials. There is authority that supervisors' manuals do not create implied contracts of employment. *See, e.g., Lakeside v. Freightliner Corp.*, 612 F.Supp. 10, 12-13 (D.Or. 1984). The distinction apparently made by the courts is that while an employee's manual written for and distributed to employees may create an implied contract, a supervisor's manual is not distributed to employees and therefore cannot be the basis of an implied-in-fact contract.

The matter thus would seem to turn on whether or not the Manual was furnished to plaintiffs, or whether they were covered by its express terms, issues the court cannot determine on the motion for summary judgment. Westmoreland has introduced affidavits from its officials stating that the Manual was not intended for or distributed to plaintiffs, while plaintiffs have submitted affidavits stating that they did receive copies of the Manual and considered from that time on that it created an employment contract. The court discounts the latter claim, but the Manual does state that it is intended to cover "non-bargaining unit employees," a group that includes Morris,

Johnson, Sargent, and Napier, who, as section foremen, were in fact supervisory employees, albeit at the lowest level.

The court therefore finds that there is a genuine issue of material fact on the question of whether or not Morris, Johnson, Sargent, and Napier were covered by the Westmoreland Employee Relations Manual. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247. Thus the defendant's motion for summary judgment on this issue must be denied.

IV.

The plaintiffs have also brought suit for defamation based on statements made by Westmoreland about them to the present. Messrs. Seabolt and Allman claim that they were defamed in the articles published in local newspapers about their firings. Relevant excerpts from each follow:

> According to Westmoreland spokesman Steve Anderson, Seabolt was terminated for violating federal laws that contributed to the accident; and Allman for violating company policies and procedures.

Kingsport Times-News, Dec. 22, 1986.

The rest of the article is a factual account of the accident.

> Two men involved in last month's fatal accident at Westmoreland Coal Co.'s Holton Mine near Exeter have been fired, according to a company spokesman.
>
> The two men, Ruben Allman and John Seabolt, both of Big Stone Gap, were fired for their roles in a Nov. 29 accident that killed Jack E. Christian, 54, of Big Stone Gap.
>
> According to a Westmoreland spokesman, Seabolt was fired for violating Federal law, and Allman for

violating company policy in the events leading up to the accident.

Bristol Herald Courier, Dec. 23, 1986.

This article concludes with a very brief description of the accident.

> Westmoreland Coal Co. has dismissed two Holton mine complex employees for apparently violating the company's safety procedures.
>
> Westmoreland Vice President/Virginia Operations Hershiel Hayden said the two men—section foremen Ruben Allman and assistant general mine foreman John Seabolt—were dismissed for violating company rules and regulations.

The Coalfield Progress, Norton, Va., Dec. 23, 1986.

Morris, Johnson, Sargent and Napier say that they were defamed by statements appearing in an article in the Big Stone Gap *Post* for December 24, 1987:

> . . . Westmoreland [has] "displaced" eleven employees at its Holton Mine.
>
> Hersh Hayden, WCC Vice President in charge of operations, Virginia Division, said this week, however, that the displacement of the 11 employees are [sic] organizational changes and not an indication of things to come in 1987.
>
> * * *
>
> Six of the employees were laid off, effective Dec. 19; three were discharged effective Dec. 18; and two accepted early retirement.
>
> * * *
>
> Hayden said the discharges were the result of overall Holton mine performance which failed to meet company expectations.

> Listed as some of the "performances" that weren't up to par at Holton were safety, coal productivity, cost reduction, and other "standards" that were not met.
>
> "These objectives must be achieved if the company is to keep up with the competition," Hayden said.

The court fails to see anything untrue in any of the above statements, possibly apart from the statement in *The Coalfield Progress* that Mr. Seabolt was discharged for violating company rules and regulations, where in fact the discharge was for violation of federal regulations. Instead, the plaintiffs mainly object to Westmoreland's conclusion that they were guilty of rule infraction or poor performance. Mr. Allman, for instance, stated in his deposition that he believed the articles defamed him because "they stated my name [and] that I violated company rules and regulation [and] I did not, [and] they interfered with me finding, finding a job. Everyone in Wise County or Southwest Virginia knows about it." Mr. Seabolt objects that the articles did not tell the "whole story" about the accident, but admits that what did appear was true. He stated, "Well, it's not false, but it's just their way of covering their hide in my opinion." He was asked:

> Q. But all it is, isn't it, is a pure statement of fact that you were dismissed for violating company rules and regulations? Whether or not you agree with the dismissal, that's why you were dismissed, isn't that true?
>
> A. Yes.

The defamation claim of Morris, Johnson, Sargent, and Napier rests on the rather vague article in the *Post* stating that some section foremen were discharged as a "result of overall mine performance which failed to meet company expectations." The article did not mention them by name, and could just as easily be interpreted to mean

that the plaintiffs were laid off because of the mine's poor performance rather than their own poor performance. However, even assuming that the article is clearly understood as referring to plaintiffs, and as stating that they were discharged for poor performance, Westmoreland has made a convincing showing, as outlined in Section I of this opinion, that this was in fact the case. The burden is on the plaintiffs on prove falsity. *Gazette v. Harris*, 229 Va. 1, 15, 325 S.E.2d 713, 725 (1985), *cert. den.* 472 U.S. 1032 (1985). Although the plaintiffs claim that the evaluations came as a surprise and they were not consulted about them, the evidence is that only 25% of the evaluation score was subjective, and that notification and consultation with plaintiffs would not have changed the results of the evaluations. If the evaluations were "trumped up," as plaintiffs claim, they have provided no evidence beyond their own surmise to prove it. Therefore, even though Westmoreland may have violated the procedures set out in its Employee Relations Manual in discharging Morris, Johnson, Sargent, and Napier, there is no evidence that they were let go for any reason other than poor performance.

Since truth is "an absolute defense [to a charge of defamation] in almost all cases," *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 151 (1967) (plurality opinion); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489 (1975); *Pilkenton v. Kingsport Publishing Co.*, 395 F.2d 989, 990 (4th Cir. 1968); *Brown v. Shupe*, 629 F. Supp. 760 (E.D.Va. 1985) (Clarke, J.), and none of the plaintiffs has met his burden of showing falsity in any material respect,[3] Westmoreland's motion for sum-

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[3] As the Virginia Supreme Court of Appeals pointed out in *Saleeby v. Free Press, Inc.*, 197 Va. 762, 763, 91 S.E.2d 405, 407 (1956): "It is not necessary to prove the literal truth of statements made. Slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance, and it is sufficient to show that the imputation is 'substantially true.'"

mary judgment as to the defamation counts must be granted.

V.

For the reasons stated herein, the defendant's motions for summary judgment on the wrongful discharge claims of Messrs. Seabolt and Allman will be granted; and its motion for summary judgment on the wrongful discharge claims of Messrs. Morris, Johnson, Sargent, and Napier will be denied. The defendant's motions for summary judgment on the defamation counts brought by all plaintiffs will be granted.

An appropriate Order will enter this day.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 9 day of January, 1989.

/s/ Glenn M. Williams
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2348

RUBEN L. ALLMAN,
Plaintiff-Appellant

v.

WESTMORELAND COAL COMPANY,
Defendant-Appellee

No. 89-2395

RUBEN L. ALLMAN,
Plaintiff-Appellant

v.

WESTMORELAND COAL COMPANY INC.,
Defendant-Appellee

ORDER

[Filed Mar. 15, 1990]

It appearing to the Court that the mandate of this Court having isued improvidently,

IT IS HEREBY ORDERED that the mandate is recalled for further proceedings in this Court.

For the Court—By Direction

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2348(L)

RUBEN L. ALLMAN,
Plaintiff-Appellant

versus

WESTMORELAND COAL COMPANY,
Defendant-Appellee

ORDER

[Filed Mar. 8, 1990]

Upon consideration of appellant's motion for an extension of time to March 14, 1990 in which to file a petition for rehearing,

IT IS ORDERED that the motion is granted.

For the Court—By Direction

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2348

RUBEN L. ALLMAN,
Plaintiff-Appellant

v.

WESTMORELAND COAL COMPANY,
Defendant-Appellee

No. 89-2395

RUBEN L. ALLMAN,
Plaintiff-Appellant

v.

WESTMORELAND COAL COMPANY INC.,
Defendant-Appellee

JUDGMENT

[Filed Feb. 21, 1990]

APPEAL FROM the United States District Court for the Western District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2348

RUBEN L. ALLMAN,
Petitioner,

v.

WESTMORELAND COAL CO.,
Respondent.

ORDER

[Filed Oct. 19, 1989]

Upon consideration of respondent's motion to submit this case on briefs and petitioner's opposition to the motion,

IT IS ORDERED that the motion to submit this case on briefs is denied. This case remains calendared for oral argument on November 2, 1989.

For the Court

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2348(L)

RUBEN L. ALLMAN,
Plaintiff-Appellant

v.

WESTMORELAND COAL CO.,
Defendant-Appellee

Appeal from the United States District Court
for the Western District of Virginia, at Big Stone Gap
Glen M. Williams, District Judge.

[Filed Sep. 6, 1989]

Upon consideration of appellee's motion for leave to file its brief with attachments,

IT IS ORDERED that the motion is granted.

For the Court—By Direction

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2348(L)

RUBEN L. ALLMAN,
Plaintiff-Appellant

v.

WESTMORELAND COAL CO.,
Defendant-Appellee

Appeal from the United States District Court
for the Western District of Virginia, at Big Stone Gap

[Filed Aug. 24, 1989]

Upon consideration of appellee's motion for leave to supplement the appendix,

IT IS ORDERED that the motion is granted, and appellee may file a supplemental appendix.

For the Court—By Direction

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2348

RUBEN L. ALLMAN,
Plaintiff-Appellant

versus

WESTMORELAND COAL COMPANY,
Defendant-Appellee

Appeal from the United States District Court
for the Western District of Virginia, at Big Stone Gap

[Filed Jan. 29, 1989]

Appellant has filed a motion for an extension of time to file brief and joint appendix requesting an additional 30 days on the ground that additional record must be transmitted from the district court to complete the record on appeal and additional time is necessary to reproduce these additional documents for the joint appendix. The Court has received the supplemental record on appeal.

Accordingly, IT IS ORDERED that appellant is granted an extension of time until July 17, 1989 within which to serve and file his brief and joint appendix.

For the Court—By Direction

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2395

RUBEN L. ALLMAN,
Plaintiff-Appellant

v.

WESTMORELAND COAL COMPANY INC.,
Defendant-Appellee

No. 89-2348

RUBEN L. ALLMAN,
Plaintiff-Appellant

v.

WESTMORELAND COAL COMPANY,
Defendant-Appellee

Appeals from the United States District Court
for the Western District of Virginia at Big Stone Gap

[Filed May 30, 1989]

Pursuant to Local Rule 28 and Internal Operating Procedure 28.2, IT IS ORDERED that:

1. the above cases are consolidated for the purpose of briefing and oral argument;

2. one joint brief shall be permitted per side;

3. the parties on each side shall share the time allowed for oral argument;

4. each side shall notify the Court of the attorney who has been designated as lead counsel within ten days of the date of this order.

For the Court—By Direction

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

89-2348

ALLMAN

v.

WESTMORELAND COAL CO.,

[Filed May 23, 1989]

BRIEFING ORDER—CIVIL CASE

The record on appeal, except for exhibits retained in the District Court pursuant to I.O.P. 11.3, was filed 5/23/89.

Briefs and the appendix shall be served and filed within the times provided in the schedule below (see note 1 for the number of copies to be filed):

Appellant's brief/Appendix (Appellant—Blue cover— 50 pg maximum) (Appendix—White cover)	July 3, 1989
Appellee's brief (if any) (Red cover—50 pg maximum)	30 days after service of brief of appellant (see note 2)
Reply brief (if any) (Gray cover—25 pg maximum)	14 days after service of brief of appellee

Unless the case is screened from the argument calendar according to Local Rule 34(a), current projections suggest that it will be heard during the 12/04/89—12/08/89 session of court. Parties will receive approximately 30 days' notice of oral argument.

Briefing and argument dates will not be re-scheduled except for the most compelling reasons.

JOHN M. GREACEN

NOTES:

1. Pursuant to Rule 30(a) and 31(b) of the Federal Rules of Appellate Procedure, the court directs the filing of the following number of copies:

   Parties not proceeding in forma pauperis—12 copies of the brief and 6 copies of the appendix;

   Parties represented by court-appointed counsel—6 copies of the brief and 5 copies of the appendix;

   Parties preceeding in forma pauperis not represented by court-appointed counsel—4 copies of the brief and the appendix.

2. The period of time for calculating the response period for briefs runs from the date set forth on the certificate of service of the opposing party's brief. If the opposing party's brief is served by mail, three days are added to the response period pursuant to Rule 26(c) of the Federal Rules of Appellate Procedure.

3. Because of the steady growth in the court's caseload, the court's liberal allowance of oral argument, and the limited number of arguments that can be heard by the current complement of judges, it is essential that every moment of argument time be used in order for the court to maintain a current docket. An oral argument slot is wasted when the court learns of an event obviating the need for argument less than 10 days before the date of argument, because there is insufficient time for preparation of a substitute appeal. Therefore you are asked to notify the court of settlement, your desire to submit the case on the briefs, the need for a continuance, or other event obviating the need for oral argument at the earliest possible time.

cc: Charlie Richard Jessee
Thomas Peter Gies
F. Thomas Rubenstein

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Action No. 87-0115-B

RUBEN L. ALLMAN,

Plaintiff,

v.

WESTMORELAND COAL COMPANY,

Defendant.

ORDER

[Filed May 8, 1989]

This case is before the court on motion of Ruben L. Allman for relief from the Order of this court entered on February 24, 1989 on the grounds of after-discovered evidence.

The court is of the opinion that the alleged new evidence does not constitute new evidence since it consists of material which was available to or should have been available to the plaintiff during the course consideration of the motion for summary judgment. Furthermore, assuming that the material should have been considered by the court, the court is of the opinion that it does not change the reasoning of the court given in the Memorandum Opinion entered by the court on January 9, 1989. Accordingly, the motion for relief from judgment is DENIED.

The clerk of this court is directed to mail certified copies of this Order to all counsel of record.

ENTER: This 8th day of May, 1989.

/s/ Glen M. Williams
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Action No. 87-0115-B

RUBEN L. ALLMAN,
Plaintiff,

v.

WESTMORELAND COAL COMPANY,
Defendant.

ORDER

[Filed Feb. 24, 1989]

Upon review of Defendant's Motion for Summary Judgment, all papers submitted in this Motion and all papers submitted in opposition to this Motion, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is granted, and it is

FURTHER ORDERED that the complaint is dismissed with prejudice.

This case is stricken from the docket of this court.

/s/ Glen M. Williams
United States District Judge

Dated: 2/24/89

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Action Number 87-0342-A

JOHN R. SEABOLT,
Plaintiff,

v.

WESTMORELAND COAL COMPANY,
Defendant.

Civil Action Number 87-0115-B

RUBEN L. ALLMAN,
Plaintiff,

v.

WESTMORELAND COAL COMPANY,
Defendant.

Civil Action Number 87-0144-A

ALLEN RAY MORRIS,
HURSHELL LEE JOHNSON,
HAROLD SARGENT,
JOHN BALLARD NAPIER,
Plaintiffs,

v.

WESTMORELAND COAL COMPANY,
Defendant.

ORDER

[Filed Jan. 9, 1989]

In accordance with a Memorandum Opinion entered this day, it is hereby ADJUDGED and ORDERED that the defendant's motions for summary judgment on the wrongful discharge claims of Messrs. Seabolt and Allman will be granted; and its motion for summary judgment on the wrongful discharge claims of Messrs. Morris, Johnson, Sargent, and Napier will be denied. The defendant's motions for summary judgment on the defamation counts brought by all plaintiffs will be granted.

It further appearing that the Memorandum Opinion disposes of all the issues in the case of *John R. Seabolt* v. *Westmoreland Coal Company*, Civil Action Number 87-0342-A, it is hereby DISMISSED and stricken from the docket of this court.

The Clerk is directed to send certified copies of this Order to counsel of record.

ENTER: This 9th day of January, 1989.

/s/ Glen M. Williams
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2348

RUBEN L. ALLMAN,
Plaintiff-Appellant

v.

WESTMORELAND COAL COMPANY,
Defendant-Appellee

No. 89-2395

RUBEN L. ALLMAN,
Plaintiff-Appellant

v.

WESTMORELAND COAL COMPANY INC.,
Defendant-Appellee

ON PETITION FOR REHEARING

[Filed April 9, 1990]

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied. Entered at the direction of Judge Hall with the concurrence of Judge Hargrove. Judge Murnaghan voted to grant the petition.

For the Court

/s/ John M. Greacen
Clerk